Supreme Court, U. S.
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In The

Supreme Court of the United States

OCTOBER TERM 1975

No. 75-1198

NOLDE BROTHERS, INCORPORATED,
Petitioner,

vs.

LOCAL NO. 358, BAKERY & CONFECTIONERY WORKERS UNION, AFL-CIO,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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In The

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No. _____

NOLDE BROTHERS, INCORPORATED,
Petitioner,

vs.

LOCAL NO. 358, BAKERY & CONFECTIONERY WORKERS UNION, AFL-CIO,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner Nolde Brothers, Incorporated (the Company) respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the Fourth Circuit Court of Appeals is not reported; the opinion is attached hereto, Appendix A, pp. A1 to A22. The opinion of the Court of Appeals denying the Company's petition for rehearing and suggestion for rehearing en banc is attached here-

to, Appendix B, p. A23. The opinion of the District Court for the Eastern District of Virginia is reported at 382 F.Supp. 1354, 87 LRRM 2646 (E.D. Va. 1974) and is attached hereto, Appendix C, pp. A24 to A33. The Court of Appeals' order denying the Company's motion for stay of mandate and the District Court's order on remand are attached as Appendices D (p. A34) and E (pp. A35-A36), respectively.

JURISDICTION

The date of the judgment and entry of judgment to be reviewed is October 23, 1975. The Company's timely petition for rehearing and suggestion for rehearing en banc was denied on November 26, 1975. This petition for certiorari was timely filed within 90 days of that date. Jurisdiction of this Court is invoked under 28 USC §1254(1).

QUESTION PRESENTED

Is an employer required to arbitrate a dispute between the employer and a union where the dispute did not arise until after the union terminated the parties' agreement to arbitrate, notwithstanding the United States Supreme Court's ruling that no obligation to arbitrate a labor dispute arises solely by operation of law?

STATEMENT OF THE CASE

The Company and Respondent, Local No. 358 Bakery & Confectionery Workers International Union (the Union) were parties to a collective bargaining contract entered into on July 28, 1970, which had an expiration date of July 21, 1973. The contract, which covered certain employees at the Company's Norfolk,

Virginia, bakery, was to remain in full force and effect after July 21, 1973 until a new agreement had been reached and executed, or until either the Union or the Company terminated the agreement by giving seven days' written notice to the other. The contract included a provision concerning severance pay and a provision establishing a mandatory grievance-arbitration procedure.[1]

On May 16, 1973 the Union advised the Company pursuant to §8(d) of the National Labor Relations Act (29 USC §158[d]) that it wished to negotiate certain changes in the existing contract. The parties negotiated for approximately three months. In a letter to the Company dated August 20, 1973, the Union terminated the contract as of August 27, 1973. At a bargaining session held August 31, 1973, the Union rejected the Company's last offer and stated that it would strike unless the Company agreed to the Union's proposals. The Company thereupon said that it would permanently close its Norfolk bakery and did permanently cease operations at that bakery on August 31, 1973.

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1. 1. Article IX. Wages.

. . .

Section 5. Each full-time employee who is permanently displaced from his employment with the Company by reason of the introduction of labor saving equipment, the closing of a department, the closing of an entire plant, or by lay off, shall be compensated for such displacement providing he has been actively employed by the Company for a period of at least three (3) years. An eligible employee's compensation for his displacement shall be on the basis of thirty (30) hours of severance pay, at his straight time hourly rate, for each full year or major portion of a year of active employment commencing with the fourth (4th) year following his most recent date of hire. Payment under this formula shall be limited to a maximum of nine hundred (900) hours of severance pay.

Subsequent to the plant closing and after the date the Union had terminated the contract, the Union made a demand for severance pay and further demanded that the Company arbitrate the issue as to whether the released employees were entitled to severance pay. The Company refused the Union's claim for severance pay and refused to arbitrate the issue of whether the employees were entitled to severance pay. The Company's position was that both the right to severance pay and the duty to arbitrate were solely creatures of the contract which earlier had been terminated by the Union.

The Union then instituted this action in the District Court to compel arbitration of the severance pay

(Footnote Continued)

2. Article XII. Grievances and Arbitration.

Section 1. All grievances shall be first taken up between the Plant Management and the Shop Steward. If these parties shall be unable to settle the grievance, then the Business Agent of the Union shall be called in, in an attempt to arrive at a settlement of the grievance. If these parties are unable to settle the grievance, the dispute will be settled as called for in Sections 2 and 3 of this Article.

Section 2. In the event that any grievance cannot be satisfactorily adjusted by the procedure outlined above, either of the parties hereto may demand arbitration and shall give written notice to the other party of its desire to arbitrate. No individual employee shall have the right to invoke arbitration without the written consent of the Union. The Arbitration Board shall consist of three (3) persons, one selected by the Company and one selected by the Union. The two persons selected shall agree upon a third person who shall act as Chairman of the Arbitration Board.

Section 3. The decision or award of the Arbitration Board, or a majority thereof, shall be final and binding on both parties. If the third party to arbitration is not selected in ten (10) days from receipt of notice, the Director of the U. S. Conciliation Service shall be requested to make the appointment. The expense of the neutral arbitrator shall be borne equally by the parties.

Section 4. Pending negotiations or during arbitration there shall be no strikes, lock-outs, boycotts, or any stoppages of work.

issue which arose after the Union terminated the agreement to arbitrate or, in the alternative, for an award of severance pay.[2] On the parties' motions for summary judgment, the District Court held that the Union's voluntary termination of its collective bargaining contract (including the arbitration agreement) with the Company destroying any right to severance pay created by the collective bargaining contract and any duty to arbitrate the severance pay issue had ended when the Union terminated the contract and the arbitration agreement contained therein. After timely appeal, the Court of Appeals for the Fourth Circuit reversed the judgment of the District Court and held that the severance pay dispute should be submitted to arbitration even though the parties' agreement to arbitrate had expired. Each member of the three-judge panel wrote a separate opinion, one judge dissenting in part.

REASONS FOR GRANTING THE WRIT

I. The Fourth Circuit's Decision Is In Conflict With Applicable Decisions Of This Court

A. The Fourth Circuit's Decision Contravenes The Rulings Of This Court That The Duty To Arbitrate Is A Creature Of Contract And Cannot Arise Solely By Operation Of Law

The Fourth Circuit's decision would compel the Company to submit to arbitration a dispute with the Union where, at the time the dispute arose, the Union and the Company were not parties to any effective arbitration agreement. There is absolutely no question in this case that the parties were not subject to an arbitra-

2. The District Court had jurisdiction of the action under 29 USC §185.

tion agreement at the time the severance pay dispute arose. The Fourth Circuit's decision would create, as a matter of law, an "agreement" to arbitrate disputes between parties arising after any agreement to arbitrate disputes between them had been unqualifiedly terminated by the same party demanding arbitration.

This Court has recognized time and time again that, while arbitration is a favored mechanism for the resolution of labor disputes, arbitration is a voluntary procedure and is solely a creature of contract. In *Gateway Coal Co.* v. *United Mine Workers*, 414 U.S. 368, 374 (1974), the Court stated:

> "No obligation to arbitrate a labor dispute arises solely by operation of law. The law compels a party to submit his grievance to arbitration only if he has contracted to do so."

Thus, in *Operating Engineers, Local 150* v. *Flair Builders, Inc.*, 406 U.S. 487, 491 (1972), the Court held that before parties can be ordered to arbitrate the issue of whether laches bars the processing of a grievance, a court must first find that "the parties are subject to an agreement to arbitrate" or that "union and employer have agreed to arbitration." In these and other cases, this court has stated that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960). In other words,

> "just as an employer has no obligation to arbitrate issues which it has not agreed to arbitrate, so *a fortiori*, it cannot be compelled to arbitrate if an arbitration clause does not bind it at all." *John Wiley & Sons* v. *Livingston*, 376 U.S. 543, 547 (1964).

This Court has made clear that the duty to arbitrate exists only if the parties are bound at the time the dispute arises by a collective bargaining contract requiring them to submit disputes to arbitration. The Fourth Circuit has plainly failed to apply these rulings of this Court in ordering the Company to arbitrate a matter which arose after the expiration of the contract in which there was a grievance-arbitration clause. This case presents the situation where all parties agree that, at the time the dispute arose, the agreement to arbitrate had been terminated; yet the Court of Appeals nevertheless ordered the parties to arbitration.

B. The Fourth Circuit's Decision Is Directly Contrary To This Court's Rulings Requiring Federal Labor Policy To Be Consistent With Policies Expressed By Congress

In addition to decisions of this Court cited above, the Fourth Circuit's decision is in conflict with this Court's clear instructions that:

> "It would be plainly inconsisitent with [*Textile Workers* v. *Lincoln Mills*, 353 U.S. 448 (1957)] . . . to say that the basic policies found controlling in an unfair labor practice context may be disregarded by the courts in a suit under §301, and thus to permit the rights enjoyed by the new employer in a successorship context to depend upon the forum in which the union presses its claims." *Howard Johnson Company* v. *Detroit Joint Board, Hotel & Restaurant Employees*, 417 U.S. 249, 256 (1974) (footnote omitted).

In *Lincoln Mills*, the Court stated:

> "[T]he substantive law to apply in suits under §301 (a) is federal law which the court must fashion from the policy of our national labor laws [citation

> omitted]. The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will be in the penumbra of express statutory mandates. Some will lack express statutory sanctions but will be solved by looking at the policy of legislation and fashioning a remedy which will effectuate that policy." *Textile Workers Union* v. *Lincoln Mills, supra,* 353 U.S. at 456-457.

Howard Johnson and *Lincoln Mills* clearly establish that the labor law policies enunciated by Congress are the touchstone of the development of the substantive body of general federal labor law in §301 actions.

In the instant case, if the Union had filed an unfair labor practice charge alleging that the Company had violated Section 8(a)(5) of the National Labor Relations Act by refusing to arbitrate a grievance arising after the expiration of the contract, the National Labor Relations Board would not have issued a complaint against the Company. *Hilton Davis Chemical Company,* 185 NLRB 241 (1970). Thus, in light of the Fourth Circuit's decision, the duty of a party to arbitrate disputes where the party is not subject to an agreement to arbitrate depends upon the forum (the Labor Board or the Fourth Circuit) in which the question is presented. The Labor Board—established by Congress to interpret, apply and enforce the nation's principal labor law—would hold that there is no duty to arbitrate after the agreement to arbitrate expires. The Fourth Circuit disagrees, notwithstanding *Lincoln Mills* and *Howard Johnson's* instruction to heed the

policies controlling in unfair labor practice contexts, as well as under other Congressional mandates.[3]

A writ of certiorari should issue because the Court of Appeals has rendered its decision in a way in conflict with applicable decisions of this Court as outlined in Parts IA and IB herein. Sup. Ct. Rule 19(1)(b).

II. The Decision Of The Fourth Circuit Court Of Appeals Is In Conflict With The Decisions Of Other United States Courts of Appeals

The Fourth Circuit's decision in this case is in conflict with the decisions of other United States courts of appeal and, accordingly, a writ of certiorari should be granted to review the decision. Sup. Ct. Rule 19(1)(b). In *IAM Local Lodge 2369* v. *Oxco Brush Division,* 517 F.2d 239 (6 Cir. 1975), the Sixth Circuit held that an employer could not be compelled to arbitrate a dispute concerning the employer's refusal to pay vacation pay to employees who had lost their jobs due to a plant closing where the dispute arose after the expiration of the labor contract and the mandatory arbitration provisions therein. The Sixth Circuit's opinion correctly interprets the doctrine established by this Court that arbitration is exclusively consensual in nature and cannot be compelled absent

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3. Indeed, the Fourth Circuit's opinion overrides the unambiguous Congressional statement that:

> "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an *existing* collective bargaining agreement." 29 U.S.C. §173(d). (Emphasis added)

The preference for dispute resolution through arbitration was never extended to situations in which the parties had not agreed to arbitrate.

the agreement of the parties.[4] To the same effect: *Local 998, UAW* v. *B & T Metals Co.*, 315 F.2d 432 (6 Cir. 1963).

In *OCAW International Union* v. *American Maize Products Company*, 492 F.2d 409, 412 (7 Cir.), cert. denied 417 U.S. 969 (1974), the Seventh Circuit held that a grievance "occurred after the termination of the agreement and was not arbitrable." The grievance alleged a lockout in breach of the labor contract. The union argued that the propriety of the employer's use of temporary replacements during the lockout was arbitrable, even if the union's contract termination notice allowed the employer to treat the no-lockout provision of the contract as expired. The Seventh Circuit rejected this claim holding that the termination notice was effective to terminate the contract and, accordingly, the grievance was not arbitrable because it involved employer conduct occurring after the contract expired. In the instant case, the Fourth Circuit would compel Petitioner to arbitrate even though the employer conduct underlying the grievance occurred after the termination of the contract.

Other Courts of Appeals' decisions in conflict with the Fourth Circuit's decision include:

1. *Milk Drivers Local No. 246* v. *Thompson's Dairy, Inc.*, 80 LRRM 3403, 3404 (D. D.C. 1972), *aff'd mem.* 489 F.2d 1272, 85 LRRM 2405 (D.C.

4. The Sixth Circuit correctly interpreted *Piano & Musical Instrument Workers Union* v. *W. W. Kimball Company*, 379 U.S. 357 (1964), as involving a situation where the grievance arose prior to the expiration of the contract. *IAM Local Lodge 2369* v. *Oxco Brush Division, supra*, 517 F.2d at 243. The Third Circuit and at least one of the opinions of the Fourth Circuit in this case have interpreted *Piano Workers* differently. *Local Lodge No. 595, IAM* v. *Howe Sound Company*, 350 F.2d 508, 511 (3 Cir. 1965).

Cir. 1974), where the District of Columbia Circuit affirmed the District Court's conclusion of law that:

> "Since the collective bargaining agreement between plaintiff and defendant had terminated prior to the time defendant went out of business, no dispute regarding severance pay could arise under the contract and as a matter of Law there could be nothing to arbitrate."

2. *Flight Engineers Int'l Assoc., EAL Chapter* v. *Eastern Air Lines, Inc.*, 359 F.2d 303, 309 (2 Cir. 1966), where the Second Circuit held:

> "we agree with the trial court that since the collective bargaining agreement between the parties had terminated, Eastern was no longer under any obligation to process as grievances the allegations of the union, or to maintain the System Board of Adjustment for the resolution of the claims here asserted by the Union."

See *Local 1251, UAW* v. *Robertshaw Controls Co.*, 405 F.2d 29 (2 Cir. 1968); *Procter & Gamble Ind. U.* v. *Procter & Gamble Mfg. Company*, 312 F.2d 181 (2 Cir. 1962), cert. denied 374 U.S. 830 (1963). *Ward Foods, Inc.* v. *Local 50, B&CW*, 360 F.Supp. 1310 (S.D. N.Y. 1973) (relying on *Flight Engineers Int'l Assoc.* v. *Eastern Air Lines, Inc., supra*, to hold that an employer could not be compelled to arbitrate a claim for severance pay arising after the termination of the labor contract).

3. *M.K. & O. Transit Lines, Inc.* v. *Division No. 892, Street, Electric Ry. and Motor Coach Employees*, 319 F.2d 488 (10 Cir.), cert. denied, 375 U.S. 944 (1963), where the Tenth Circuit held that the duty to arbitrate new terms and condi-

tions of employment which was expressly provided for in the prior labor contract expired when the union terminated the agreement.

The foregoing decisions of Courts of Appeal in the Second, Sixth, Seventh and Tenth Circuits are in conflict with the Fourth Circuit's decision that the Company must arbitrate a dispute which arose when there was no agreement requiring the Company to arbitrate any dispute. The Fourth Circuit attempted to distinguish the decisions of the other Courts of Appeal on the basis of the subject matter of the grievances involved. This purported basis for differentiation further highlights the error of the Fourth Circuit.

During the term of the labor contract, the Company and the Union agreed that "all grievances" could be submitted to arbitration. The Fourth Circuit characterized the arbitration clause as "all-encompassing" (p. A2, *infra*). The Fourth Circuit also said that the parties' agreement to arbitrate extends beyond the term of the contract. Yet, according to the decision, after the expiration of the contract, the agreement to arbitrate is not all-encompassing but extends only to certain issues. Putting aside for the moment the fact that there is no contractual basis for the Fourth Circuit's extension of the arbitration clause in perpetuity, the Company submits that the error of the decision is highlighted when the Fourth Circuit attempts to limit this perpetual extension of the contractual duty to arbitrate only to some issues, all in derogation of the parties' (expired) agreement as to the scope of the duty to arbitrate.

By the time the Fourth Circuit's reasoning reaches its ultimate judgment, the Fourth Circuit has imposed its own will on the parties as to when and what the

parties must submit to arbitration. In other words, to distinguish the decision of the other Courts of Appeal, the Fourth Circuit rewrote the parties' expired arbitration agreement to extend its duration, on the one hand, but to limit its scope, on the other hand. The Fourth Circuit, unlike the other referenced Courts of Appeal, has totally repudiated and destroyed the consensual nature of arbitration which is arbitration's fundamental characteristic and redeeming value as a labor-management dispute resolution procedure.

III. If The Court Believes That Its Decisions Have Not Resolved The Question Presented, A Writ Of Certiorari Should Issue Because The Question Presented Is An Important One

If the Court believes that the decisions of this Court cited in Part I herein did not establish the principle that an employer could not be ordered to arbitrate a dispute with a union after their agreement to arbitrate has expired, the question is an important one which should be settled by this Court. Sup. Ct. Rule 19(1)(b).

The ramifications of a ruling that an employer must arbitrate disputes after the labor contract has expired are immense. As a result of the Fourth Circuit's unilateral rewriting of the voluntarily achieved arbitration agreement, a whole new morass of legal entanglements will envelop labor and management, such as:

(1) Does the duty to arbitrate disputes arising between the parties after the expiration of the contract have any limitation in time or does it extend forever?

(2) Does the duty to arbitrate disputes arising between the parties after the expiration of the

contract extend to each and every dispute between them?

(3) Is there any means to terminate the duty to arbitrate disputes arising between the parties after the labor contract has expired by its terms?

(4) An employer presently has the right to implement new terms and conditions of employment after bargaining to an impasse with the union. Assume that the prior contract provided for severance pay but the employer bargains to an impasse on its proposal to provide an increased hourly wage but not severance pay. Assume further that the employer lawfully implements its proposal but, before the parties have reached agreement on a new contract, the employer is compelled to cease operations. Can a union, in the foregoing circumstances, compel an employer to arbitrate the employees' right to severance pay under the expired contract?

(5) If one party is to be held to a duty to arbitrate issues after the expiration of the agreement to arbitrate, will the other party be free to take economic action or will it be subject to some restraint conceived as a *quid pro quo* for the perpetual duty to arbitrate, i.e., an implied, continuing, no-strike obligation?

The possibility for these and many other unsettling developments in labor-management relations arise as a direct result of the Fourth Circuit's decision.

The Fourth Circuit's decision raises important issues because it ignores the fact that arbitration is a favored procedure for resolving disputes only where the parties have voluntarily agreed to arbitration. Absent

an agreement to arbitrate, it has been the policy of federal labor laws to allow the parties to resolve their disputes voluntarily, even by the use of economic weapons. The Fourth Circuit's opinion could lead to great inroads on these long existing and fundamental federal labor policies; for this reason, the Court should grant a writ of certiorari to review the Fourth Circuit's decision.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 74-2285

Local Number 358, Bakery & Confectionary Workers Union, AFL-CIO,
Appellant,
versus
Nolde Brothers, Incorporated,
Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Robert R. Merhige, Jr., District Judge.

(Argued April 8, 1975 Decided October 23, 1975)

Before ALDRICH, Senior Circuit Judge,* CRAVEN and WIDENER, Circuit Judges.

*First Circuit, Sitting by Designation.

Ronald Rosenberg, (Henry Kaiser; Van Arkel; Kaiser, Gressman and Rosenberg; Jery D. Anker; Lawrence J. Sherman; Lichtman, Abeles, Anker and Nagle; Jay Levit; Stallard and Levitt on brief) for Appellant; Francis V. Lowden, Jr., (Abram W. Vandermeer, Jr.; Hunton, Williams, Gay and Gibson on brief) for Appellee.

CRAVEN, Circuit Judge:

In 1970 Nolde Brothers, Inc. and Local No. 358 of the Bakery and Confectionery Workers International Union entered into a collective bargaining agreement covering the employees at the company's Norfolk bakery. The agreement provided for severance pay upon the closing of the bakery for each employee actively employed by Nolde for at least three years,[1] and also contained an all-encompassing arbitration clause.[2]

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1. Article IX. Wages.

. . .

Section 5. Each full-time employee who is permanently displaced from his employment with the Company by reason of the introduction of labor saving equipment, the closing of a department, the closing of an entire plant, or by lay off, shall be compensated for such displacement providing he has been actively employed by the Company for a period of at least three (3) years. An eligible employee's compensation for his displacement shall be on the basis of thirty (30) hours of severance pay, at his straight time hourly rate, for each full year or major portion of a year of active employment commencing with the fourth (4th) year following his most recent date of hire. Payment under this formula shall be limited to a maximum of nine hundred (900) hours of severance pay.

2. Article XII. Grievances and Arbitration.

Section 1. All grievances shall be first taken up between the Plant Management and the Shop Steward. If these parties shall be unable to settle the grievance, then the Business Agent of the Union shall be called in, in an attempt to arrive at a settlement of the grievance. If these parties are unable to settle the grievance, the dispute will be settled as called for in Sections 2 and 3 of this Article.

On August 21, 1973, following several months of fruitless negotiations over proposed changes in the contract, the Union gave the seven days written notice required to terminate the agreement. Negotiations continued for a few days after the termination, but on August 31, the company, faced with the Union's threats to strike over certain contract demands, permanently closed the bakery. Nolde subsequently paid wages and vacation pay accrued through the date of the contract termination, and in addition paid wages for the few days between contract termination and the August 31 closing. But the company rejected the Union's demand that it either give severance pay to all its employees or arbitrate its duty to do so.

The Union then instituted this suit under Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, to compel arbitration of the severance pay issue or, in the alternative, for an award of the severance pay. The district court granted the company's motion

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Section 2 In the event that any grievance cannot be satisfactorily adjusted by the procedure outlined above, either of the parties hereto may demand arbitration and shall give written notice to the other party of its desire to arbitrate. No individual employee shall have the right to invoke arbitration without the written consent of the Union. The Arbitration Board shall consist of three (3) persons, one selected by the Company and one selected by the Union. The two persons selected shall agree upon a third person who shall act as Chairman of the Arbitration Board.

Section 3. The decision or award of the Arbitration Board, or a majority thereof, shall be final and binding on both parties. If the third party to arbitration is not selected in ten (10) days from receipt of notice, the Director of the U. S. Conciliation Service shall be requested to make the appointment. The expense of the neutral arbitrator shall be borne equally by the parties.

Section 4. Pending negotiations or during arbitration there shall be no strikes, lock-outs, boycotts, or any stoppages of work.

for summary judgment on both counts, holding (1) that "the union's voluntary termination of its collective bargaining agreement with the company . . . destroyed any right to severance pay created by the collective bargaining agreement for displaced employees;" (2) that there was thus no severance pay issue to arbitrate; and (3) that even if there had been an arbitrable issue there was no duty to arbitrate, for it had died with the contract that created it.

We disagree. In our view, the district court approached the issues backwards when it first determined whether the company's obligation for severance pay survived the contract. This is a question more suitable for arbitration than judicial decision, as we explain below. Thus, the first question for the district court was whether the company's duty to arbitrate this particular issue survived the expiration of the contract. We believe it did, and accordingly we reverse and remand with instructions that the district court order the company to arbitrate.

I.

The Union and the company apparently presented to the district court, as they have to us, contrasting views of the nature of severance pay. The Union argued that severance pay is an "earned" or "vested" right accruing to employees over a period of time, whose benefits cannot be denied them regardless when they come to fruition. The company, on the other hand, characterized severance pay as "a creation of the collective bargaining agreement," with the right to it contingent upon the occurrence of the triggering event—here the bakery closing—during the term of the contract.

The district court erred in choosing one characterization—the company's—over the other, for in fact severance pay has no immutable nature. It is indeed a creature of contract, but this means no more nor less than that it is in a given case exactly what the parties intended to make it when they bargained. In one case the parties may intend it to be available only if a triggering event occurs during the contract term. But as the Supreme Court has noted, there is "no reason why parties could not if they so chose agree to the accrual of rights during the term of an agreement and their realization after the agreement had expired." *John Wiley & Sons* v. *Livingston*, 376 U.S. 543, 555 (1964). Thus the nature of the employees' right to severance pay in the circumstances here depends entirely upon the intent of the Union and the company when they wrote the relevant provision.

Any question of the intent behind a collective bargaining term must be referred to arbitration if it is available. This is in accord with the national labor policy expressed by Congress:

> Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or *interpretation* of an existing collective-bargaining agreement.

LMRA § 203(d), 29 USC § 173(d) (emphasis added). This is also the clear teaching of the *Steelworkers Trilogy*,[3] and is based on the sound principle that an arbi-

3. United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

trator, familiar as he is with both the parties and the industry, is better positioned than a court to divine their intent:

> The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it. The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment.

United Steelworkers v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-82 (1960).

The arbitrator's absolute authority in such a matter, and a court's corresponding lack of power, was affirmed in another passage from the *Steelworkers Trilogy:*

> [T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.

United Steelworkers v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960). The district court below pre-empted the arbitrator rather than overruling him. But he may do neither under the labor law.

II.

The company argues most strenuously, however, that it cannot be ordered to arbitrate the severance pay issue because the collective bargaining agreement containing its duty to arbitrate had been terminated before the instant dispute arose. In support of its position the company cites several Supreme Court statements to the effect that a party cannot be required to arbitrate any issue unless it has agreed to do so.[4] We think the statements do not support the company's contention that a duty to arbitrate cannot survive the termination or expiration of a contract.

First, the Supreme Court has itself undercut the apparent premise that arbitration must rest upon contract by holding that in some circumstances a new employer who takes over a unionized business can be compelled to arbitrate under the arbitration clause of its predecessor's agreement, even though the new employer—a stranger to the bargaining—never agreed to such arbitration. *John Wiley & Sons, supra.* Although the potential implications of the *Wiley* case have since been narrowed, *see Howard Johnson Co.*

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4. For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.

United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582 (1960).

> Under our decisions, whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties.

Atkinson v. Sinclair Ref. Co., 370 U.S. 238, 241 (1962).

> The law compels a party to submit his grievances to arbitration only if he has contracted to do so.

Gateway Coal Co. v. UMW, 414 U.S. 368, 374 (1974).

v. *Hotel Employees*, 417 U.S. 249 (1974); *NLRB* v. *Burns Security Services, Inc.*, 406 U.S. 272 (1972), the Court has not retreated from its recognition that in some instances the national labor policy can impose an arbitration duty upon an unconsenting party:

> While the principles of law governing ordinary contracts would not bind to a contract an unconsenting successor to a contracting party, a collective bargaining agreement is not an ordinary contract. ". . . [I]t is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. . . . The collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant." . . . Central to the peculiar status and function of a collective bargaining agreement is the fact, dictated both by circumstance, . . . and by the requirements of the National Labor Relations Act, that it is not in any real sense the simple product of a consensual relationship.

John Wiley & Sons, supra, at 550 (citations omitted).

It is true that in *Wiley* there was a contract with an arbitration clause in existence when the union filed suit to compel arbitration,[5] whereas here there was none either when the dispute arose or when suit was filed. But we believe the Supreme Court has indicated that the principle of *Wiley* requires arbitration in the

5. The original employer and the union had entered into a contract with an arbitration clause that was to expire on January 31, 1962. The original employer merged with the new employer on October 2, 1961. The union filed suit against the new employer to compel arbitration one week before the expiration of its contract with the original employer. *See* 376 U.S. at 544-46.

latter circumstance as well. In *Piano & Musical Instrument Workers* v. *W. W. Kimball Co.*, 221 F. Supp. 461 (N.D. Ill. 1963), the district court held that a union-employer dispute over rehiring of discharged employees, centering on the employees' seniority rights, was arbitrable even though the dispute arose several days after termination of the parties' collective bargaining agreement. The Seventh Circuit reversed, holding that arbitration could not be required in such circumstances. 333 F.2d 761, 765 (1964). The Supreme Court granted certiorari and summarily reversed the Seventh Circuit. 379 U.S. 357 (1964). Significantly, the Supreme Court cited only the first *Steelworkers Trilogy* case[6] and *Wiley*.

We believe *Wiley* and its use by the Supreme Court in *Piano Workers* support our view that a dispute that turns on whether parties intended certain accruable rights to be enjoyable, even after contract expiration, must be arbitrated if the contract provided for arbitration of such disputes, even if the contingency giving rise to the dispute itself transpired after expiration of the contract. *Accord, Steelworkers* v. *H. K. Porter Co.*, 64 L.R.R.M 2201 (W.D. Pa. 1966); *cf. IAM* v. *Howe Sound Co.*, 350 F.2d 508 (3d Cir. 1965). *But see U.A.A. & A.I.W.* v. *Robertshaw Controls Co.*, 405 F.2d 29 (2d Cir. 1968) (en banc); *Ward Foods, Inc.* v. *Bakery & Confectionery Workers*, 360 F. Supp. 1310 (S.D.N.Y. 1973); *cf. Milk Drivers* v. *Thompson's Dairy, Inc.*, 80 L.R.R.M. 3403 (D.D.C. 1972), *aff'd mem.*, 489 F.2d 1272 (D.C. Cir. 1974).

6. United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).

The company does not deny that the contract by its terms contemplated arbitration of any dispute over severance pay. Thus it is clear that the company literally agreed to arbitrate any issue of its obligation for severance pay. *See* note 4, *supra,* and accompanying text.

Judge Widener, concurring and dissenting, advances an argument that the employer rejects. The battle was not joined here or in the district court over whether the court or the arbitrator should decide that the question was arbitrable. What the fight is about, as stated in appellee's brief, is whether the duty to arbitrate can survive contract termination. We think the issue to which our brother Widener has addressed himself is not before us, but because of our respect for his viewpoint, we would add that we read the cases upon which he relies as being consistent with the general rule that the initial question of arbitrability is a matter to be determined by the court. An exception to the rule is where a clause in a labor contract purporting to exclude some matters from arbitration is vague and ambiguous. In such a case an arbitrator may be expressly empowered to not only adjudge grievances but also to decide whether the instrument gives him the power to do so. That is all that we held in *A. S. Abell Co.* v. *Baltimore Typographical Union No. 12,* 338 F.2d 190 (4th Cir. 1964). Indeed, Judge Sobeloff said in that case that if the meaning of the exclusionary section "were entirely clear it would become the duty of the court to declare the meaning." Again, in *Winston-Salem Printing Pressmen & Assistants Union No. 318* v. *Piedmont Publishing Co.*, 393 F.2d 221 (4th Cir. 1968), Judge Sobeloff writing for the court, acknowledged that

"submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty." Only then did he conclude that the contract in that case specifically provided that the construction to be placed upon any clause, including the clause authorizing arbitration, was to be resolved through the grievance procedure and by the arbitrator himself. Judge Winter, sitting as a district judge, has written to the same effect. *Local 24, IBEW* v. *Wm. C. Bloom & Co.*, 242 F. Supp. 421, 428-29 (D.Md. 1965). Indeed, the rule and its exception are now so well settled that both have found expression in one of the encyclopedias:

> Since the duty to arbitrate is of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty. The questions whether a party to a collective bargaining agreement must arbitrate, and what issues he must arbitrate, must be determined by the court on the basis of the contract entered into by the parties.
>
> However, the arbitrability of a dispute may itself be subject to arbitration if the parties have clearly so provided in the agreement. Of course, the court must decide the threshold question whether the parties have in fact conferred this power on the arbitrator. If they have, the court should stay proceedings pending the arbitrator's determination of his own jurisdiction, unless it is clear that the claim of arbitrability is wholly groundless.

48 Am. Jur. 2d "Labor and Labor Relations" § 1257 at 783-84.

We simply hold that the company must abide by that agreement even after the contract embodying it has terminated. Not only the decisions in *Wiley* and *Piano Workers*, but also policy considerations indicate such a result. The company's obligation for severance pay depends upon the parties' intent behind the contract provision for severence pay. A court, after the *Steelworkers Trilogy*, is not the proper form [sic] in which to inquire into that intent. If the expiration of the contract were held to strip the arbitrator of power, the best means of determining the true content of the parties' original agreement would not be available—which would increase the possibility of the parties' resorting to economic warfare in support of their respective interpretations. But this is precisely the kind of industrial unrest that collective bargaining, coupled with arbitration of difference over contract terms, is intended to avert. *See* LMRA § 101, 29 U.S.C. § 151. Our holding that arbitration is still available serves the most basic policy of our labor laws.

Our decision should not be read as disapproving those cases that hold arbitration unavailable for resolution of individual employee grievances, or disputes involving nonaccruable rights, that arise after expiration of a collective bargaining agreement. *See, e.g., OCAW* v. *American Maize-Prods. Co.*, 492 F.2d 409 (7th Cir.), *cert. denied*, 417 U.S. 969 (1974); *Procter & Gamble Indep. Union* v. *Procter & Gamble Mfg. Co.*, 312 F.2d 181 (2d Cir. 1962), *cert. denied*, 374 U.S. 830 (1963); *Garlick Funeral Homes* v. *Service Employees*, 85 L.R.R.M. 2749 (E.D.N.Y. 1974). We consider those cases different. To hold that a company had to arbitrate an employee discharge or a lockout that occurred after expiration of a contract providing for arbitration would mean that an employer who once agreed to submit its managerial actions to potential arbitration would in effect have agreed to do so for all time. That we do not hold. Our decision affects only those rights, like severance pay, that employees earn and that may or may not "vest" for future enjoyment—contingent upon a particular event.[7] The best way to determine whether the union and the employer meant for employees to enjoy those rights regardless of when the contingency occurs is to arbitrate. That is all we require.

Reversed and Remanded
With Instructions.

ALDRICH, Senior Circuit Judge, concurring:

With great respect, I am not entirely sure of the full extent that my brethren are in disagreement, and perhaps I am being over-simplistic. However, it seems to me that what the parties are disputing—whether the claim for compensation vested while the contract

7. We believe one of the cases heavily relied upon by appellee is distinguishable from this case on the ground discussed in the text. In Milk Drivers v. Thompson's Dairy, 80 L.R.R.M. 3403 (D.D.C. 1972), *aff'd mem.*, 489 F.2d 1272 (D.C. Cir. 1974), the court refused to order arbitration over severance pay when a company went out of business after the expiration of the collective bargaining agreement. But the contract there did not on its face grant employees an absolute right to severance pay, as does the contract in the instant case. Instead, the contractual duty of the employer was to "negotiate the terms of discontinuance regarding severance pay." Under that contract there was no room for an argument that the parties *at the time of original bargaining* had intended employees to receive severance pay upon a post-termination shutdown. The contract contemplated only that the parties would discuss the *possibility* of severance pay *at the time of shutdown*. Nothing could accrue, and the obligation to negotiate simply died with the contract. An agreement to negotiate does not last forever.

was in force, and therefore survived its termination—is plainly a grievance within the meaning of the arbitrability clause, and neither we, nor the arbitrator, face the issue of arbitrability. The only issue, in other words, is whether the grievance is sound, which, of course, is for the arbitrator.

I see three possibilities open to court decision in this area: that there is an arbitrable issue of substance; that there is an arbitrable issue of whether the issue of substance is one subject to arbitration; or there is no arbitrable issue at all. If Judge Widener denies this first possibility, then I must disagree with him. At the same time, I think I see what troubles him. If the arbitrator, when appointed, rendered a decision to the effect that he saw no arbitrable issue, I don't know what a court could do about it. We do not face that question and I doubt if a court ever would. However, I do not see how, in theory, a court that can, in the proper circumstances, rule that there is no question to be arbitrated, cannot equally rule that there is one. Indeed, that is what it does every time it instructs the arbitrator that there is an arbitrable issue whether the arbitration clause covers the substantive matter sought to be arbitrated.

WIDENER, Circuit Judge, concurring and dissenting:

While I agree that this case calls for referral to arbitration, I do not agree that *Piano & Musical Instrument Workers* v. *W. W. Kimball*, 379 US 357 (1964), forecloses an objection to arbitration being lodged before the arbitrator. I, therefore, respectfully dissent from that portion of the majority's opinion.

In *Piano Workers*, the defendant Kimball had entered into a collective bargaining agreement with Piano

& Musical Workers Local 2549. The contract period ran from October 1, 1960 to October 1, 1961. In August 1961, the defendant decided to discontinue operations at its Melrose Park Plant in Illinois and began the process of discharging all employees at that location. On October 9 of that year, eight days after the expiration of the collective bargaining agreement, Kimball opened a new plant at French Lick, Indiana.

Despite the fact the union contract had been terminated, the union claimed its members had a right to priority in employment at the new plant. It based its claim on Article II, Section 2, Paragraph 6 of the contract, which stated:

> "When reemployment occurs employees will be called back to work in order of their seniority."

When the company refused to follow the rehiring procedure desired by the union or submit the dispute to arbitration, the union brought suit in the United States District Court for the Northern District of Illinois.

The district court in that action determined that the question of whether the issues raised by the complaint were arbitrable following termination of the contract was a subject for arbitration. As the court pointed out, it was "the arbitrator's construction of that [arbitration] clause and not the Court's that was bargained for." 221 F.Supp. 463. The court did not, therefore, in that holding, go so far as to hold that the union-employer dispute over rehiring was, in fact, arbitrable.

On appeal, the Seventh Circuit held that the lower court's determination that the question of arbitrability was for the arbitrator was in error. But it went on to conclude that arbitration could not be ordered under

the circumstances since the record failed to show that Kimball, during the term of the agreement, had in any way violated the contract rights of any of its employees. 333 F2d 761.

The Supreme Court subsequently granted certiorari and summarily reversed the Seventh Circuit. The question presented to the Supreme Court, however, did not include the issue of whether the court or the arbitrator was to determine the threshold question of arbitrability under these circumstances. Rather, the issue before the Court in that case was the propriety of the Circuit Court's dismissal of the appellant's claim based upon the merits of the dispute.[1]

I am of the opinion, therefore, that *Piano Workers* does not require that the substantive dispute in the present case be deemed arbitrable. Nor do I believe that the conclusion is mandated by the Supreme Court's opinions in *United Steelworkers* v. *American Mfg. Co.* or *John Wiley & Sons* v. *Livingston.*[2] The question before us is a very narrow one: Is the arbitration clause susceptible of an interpretation that necessarily covers the asserted dispute? While doubts should be resolved in favor of coverage, *United Steelworkers* v. *Warrior & Gulf Co.*, 363 US 574, 582-83 (1960); *A. S. Abell Co.* v. *Baltimore Typographical Union No. 12*, 338 F2d 190, 193 (4th Cir. 1964), the court should ever be mindful of Mr. Justice Douglas'

1. The second opinion of the district court which establishes what the Supreme Court decided in its own case was not considered by the majority here. It is reported in 239 F.Supp. 523 (1965).

2. The *Steelworkers Trilogy* and *John Wiley and Sons* were specifically discussed and construed in our opinion in *Winston-Salem Printing Pressmen & Assistants Union No. 318* v. *Piedmont Publishing Co.*, 393 F2d 227 (4th Cir. 1968), which case is later discussed.

admonishment in *United Steelworkers* v. *American Mfg. Co.*, 363 US 564 (1960):

> "The courts . . . have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claims." 363 US 564, 568.

Thus, where the determination of the arbitrability of a dispute would necessarily require consideration of the merits of the underlying disagreement, both issues should be submitted to the arbitrator. *A. S. Abell Co.* v. *Baltimore Typographical Union No. 12*, 338 F2d 190 (4th Cir. 1964).

Our decision in *Winston-Salem Printing Pressmen & Assistants Union No. 318* v. *Piedmont Publishing Co.*, 393 F2d 221 (4th Cir. 1968),[3] is precisely in point here on facts which are indistinguishable for all practical purposes. The majority, however, fails to follow that case. There, we scrupulously avoided any expression as to how the question of arbitrability should be

3. An examination of the contract in that case shows that the phrase construed was "any dispute" over wages, hours, working conditions, and shop practices. 393 F2d 221, n. 1. I submit the difference between "any dispute" in *Winston-Salem Printing Pressmen*, and "any grievance" in question here, is more theoretical than real. It is true that in the *Winston-Salem Printing Pressmen* case the contract provided for arbitration of "the construction to be placed upon any clause of . . . [the] agreement," but that is what a grievance is, a dispute between employee and employer over the meaning of the collective bargaining agreement. A case directly in point and consistent with my viewpoint is *U.A.W., et al.* v. *Cardwell Mfg. Co.*, 304 F2d 801 (10th Cir. 1962), where the matter to be submitted to arbitration was a "grievance" which was defined in the contract as "any dispute between the Company and the Union." Here, the fact that "any grievance" is undefined by contract is all the more reason to submit to arbitration the applicability of the phrase to the dispute at hand.

resolved where the application of the arbitration clause itself was subject to dispute. In that case, an employer sought to avoid arbitration on the grounds that the duty to arbitrate ceased with the expiration of the contract when the request to arbitrate came subsequent thereto. The district court concluded that the contract in question did not state that notice to arbitrate had to be given prior to expiration of the agreement, but that should settlement of contract disputes prove impossible, the differences would be arbitrated. On appeal, we held that where the issue of arbitrability involved interpretation of the contract, the entire matter, including the question of arbitrability should be submitted to the arbitrator.

It is generally held that the term "grievance" is not a term of art, and has no connotation different from its meaning in ordinary use. *Forrest Industries, Inc.* v. *Local No. 3—436 Int. Woodworkers*, 266 F.Supp. 265 (D. Ore. 1966), aff'd. 381 F2d 144 (9th Cir. 1967); *Butte Miner's Union No. 1, etc.* v. *Anaconda Co.*, 159 F.Supp. 431, 435 (D. Mont. 1958); *Petition of Labor Mediation Board*, 365 Mich. 645, 114 N.W.2d 183, 187 (1962); *Timken Roller Bearing Co.* v. *NLRB*, 161 F2d 949, 955 (6th Cir. 1947). And the teaching of the Supreme Court in its decision in *Warrior & Gulf* is to the effect that a liberal and broad construction should be given the term in the interest of encouraging the use of machinery which the parties themselves have set up for the peaceful settlement of disputes. *Forrest Industries, Inc.* v. *Local No. 3-436, Int. Woodworkers*, 381 F2d 144, 146 (9th Cir. 1967).

Warrior & Gulf states the rule we should follow now, as we have in the past:

"Since any attempt by a court to infer such a purpose necessarily comprehends the merits, the court should view with suspicion an attempt to persuade it to become entangled in the construction of the substantive provisions of a labor agreement, even though the back door of interpreting the arbitration clause, when the alternative is to utilize the services of an arbitrator."

* * *

"The judiciary sits in these cases to bring into operation an arbitral process which substitutes a regime of peaceful settlement for the older regime of industrial conflict. Whether contracting out in the present case violated the agreement is the question. It is a question for the arbiter, not for the courts." 363 US at 585.

This conclusion is consistent with our earlier holding in *A. S. Abell Co.* v. *Baltimore Typographical Union No. 12*, 338 F2d 190 (4th Cir. 1964), where we stated that where it is not "clear beyond rational debate" that the litigants intended the dispute to be submitted to arbitration, the entire matter, including the question of arbitrability, should be referred to the arbitrator. To conclude otherwise would be to foreclose any opportunity to establish, by way of bargaining history, the intent of the parties to exclude certain matters from arbitration, for it is firmly established in this circuit that bargaining history is of no legitimate use in determining whether to order the submission of a grievance to arbitration. Id. at 194. See also *Local No. 1434 IBEW* v. *E. I. duPont deNemours & Co.*, 350 F.Supp. 462, 466-67 (E.D. Va. 1972).

In the instant case, it is by no means "clear beyond rational debate" that the dispute over severance pay after contract termination constitutes a "grievance" within the meaning of the contract. The contract itself merely provides:

> "In the event any grievance cannot be satisfactorily adjusted . . . either of the parties hereto may demand arbitration. . . ."

Nowhere within the agreement have the parties attempted to define "any grievance." Since the phrase "any grievance" is left undefined, whether the parties intended that disputes arising after the termination of the contract be subject to arbitration may well call for a detailed examination of the bargaining history leading up to the contract, a task uniquely suited to the arbitrator. I am of opinion either party should be allowed to offer bargaining history to explain the unde-

fined phrase, which, being undefined, and subject to bargaining history, is not "clear beyond rational debate."

The majority, without the benefit of any evidence as to the parties' intent, has chosen to foreclose further inquiry into the question of arbitrability. In essence, it holds that the courts must conclusively decide the question of arbitrability, even where it is not "clear beyond rational debate" what the intent of the parties might have been. In so doing, the majority opinion extends an open invitation, indeed a command, to the courts to entangle themselves in the construction of both procedural and substantive provisions of labor agreements. This I consider to be improvident, clearly contrary to the law which has prevailed in this circuit, and not in keeping with the rule as stated in *Warrior and Gulf* at p. 585.

Moreover, whether the parties in the instant case intended for the dispute over severance pay to be subject to arbitration after the termination of the contract seems to me to be inextricably intertwined with the substantive problem of whether or not it was the intent of the parties that severance pay provided for in the contract survive its termination. Certainly, no dispute can arise under the terms of the expired contract unless some substantive right survives its expiration.

Even assuming that there be doubt that the dispute is arbitrable, given the standard to be applied, it is clear that this matter must be submitted to arbitration at least for threshold consideration. To go further, however, and hold that the controversy is so clearly arbitrable under the contract as to foreclose the introduction of any evidence before the arbitrator as

to the intent of the parties is, in my opinion, to substitute the views of this court for that of the arbitrator as to the merits of the dispute. This would create a "curious rule which required that intertwined issues . . . growing out of a single dispute and raising the same question on the same facts had to be carved up between two different forums, one deciding after the other. Neither logic nor considerations of policy compel such a result."[4]

I would accordingly remand with instructions that:

(1) The whole dispute should be referred to arbitration.

(2) At the arbitration, the company may make the objection that the dispute over severance pay under the facts presented was not intended by the parties to be subject to arbitration.

(3) If the arbitrator should decide the dispute is subject to arbitration, then he should go on and decide, under the facts presented, the substantive question of whether or not "the parties intended. . . [severance pay] rights to be enjoyable even after contract expiration." Slip opinion, p. 11.

Since the Supreme Court in *Piano Workers* did not decide the question of whether the question of arbitrability of the dispute was subject to arbitration, the majority here has obviously chosen to follow the Seventh Circuit in *Piano Workers* rather than our own

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4. *John Wiley & Sons* v. *Livingston*, 376 US 543, 547 (1964). While the Court was dealing with a question of procedural arbitrability, the logic employed there appears equally applicable to the facts of this case for the majority here has taken "intertwined issues . . . growing out of a single dispute" and carved them up between two different forums.

cases. Not only do I prefer the logic of *Cardwell Mfg. Co.* and our cases of *A. S. Abell Co.* and *Winston-Salem Printing Pressmen*, for they give a more liberal reading to arbitration provisions, which I think consistent with national labor policy, I submit we are bound by our own decisions absent an en banc court.

"Whether contracting out [arbitration] in the present case violated the agreement is the question. It is a question for the arbiter, not the courts." 363 US at 585. This final conclusion of the Supreme Court in *Warrior and Gulf* is equally applicable here and no more than a following of the statute, 29 USC § 173(d), as it declares that settlement of labor disputes by arbitration is the "desirable method" for settling "grievance disputes" arising not only from the "interpretation" of collective bargaining agreements, but also their "application." Typical of the majority opinion is its placing of italics on *interpretation* in its quotation of the statute, slip opinion p. 6, while not acknowledging anywhere in the opinion the equal emphasis Congress placed on *application*. That is its fundamental error.

Thus, the majority has fallen into the same trap for which it chides the district court at p. 7 of the slip opinion. It "pre-empted the arbitrator rather than overruling him." It "may do neither under labor law." This court has no more authority to pre-empt the arbitrator than has the district court.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 74-2285

Local Number 358, Bakery & Confectionary Workers Union, AFL-CIO,
Appellant,
vs.
Nolde Brothers, Incorporated,
Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond.

(Filed November 26, 1975)

The appellee's petition for rehearing and suggestion for rehearing en banc has been submitted to the court. A poll of the court was requested, and in the poll a majority of the judges eligible to vote therein have voted to deny rehearing and rehearing en banc.

It is, therefore, ORDERED that rehearing and rehearing en banc be and they are hereby denied.

For the Court—by direction.

/s/ William K. Slate, II
Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

CIVIL ACTION NO. 73-663-R

LOCAL NO. 358, BAKERY AND CONFECTIONERY
WORKERS INTERNATIONAL UNION

v.

NOLDE BROS., INC.

MEMORANDUM

(Filed September 19, 1974)

This matter arises out of plaintiff Local No. 358, Bakery and Confectionery Workers International Union's ("the union") voluntary termination of its collective bargaining agreement with defendant Nolde Brothers, Inc. ("the company"), and the company's subsequent permanent closure of its Norfolk bakery on August 31, 1973, three days subsequent to the termination of the collective bargaining agreement. Despite the fact that there was no collective bargaining agreement in existence on August 31, 1973, when the company ceased operations, the union asserts that its newly unemployed members were entitled to collect severance pay, which had been provided for in Article IX, § 5 of the collective bargaining agreement or, alternatively, that the company was under a contractual obligation to arbitrate the severance pay issue. The company resists

both these contentions and further attacks the union's assertion that this Court has jurisdiction under § 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, and under the United States Arbitration Act, 9 U.S.C. § 4.

Each party has filed a motion for summary judgment, and the matter is now ripe for disposition.

The facts are undisputed: The union and the company entered into a collective bargaining agreement on July 28, 1970, having an expiration date of July 21, 1973, and containing the severance pay and arbitration clauses here at issue.[1] By the terms of Article XIX the agreement was to remain in full force and effect after July 21, 1973, until a new agreement had been reached and executed, or until either the union or the company terminated the agreement by giving seven days written notice.

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1. . . . Article IX—*Wages*

Section 5. Each full-time employee who is permanently displaced from his employment with the Company by reason of the introduction of labor saving equipment, the closing of a department, the closing of an entire plant, or by lay off, shall be compensated for such displacement providing he has been actively employed by the Company for a period of at least three (3) years. An eligible employee's compensation for his displacement shall be on the basis of thirty (30) hours of severance pay. at his straight time hourly rate, for each full year or major portion of a year of active employment commencing with the fourth (4th) year following his most recent date of hire. Payment under this formula shall be limited to a maximum of nine hundred (900) hours of severance pay.

. . . Article XII—*Grievances and Arbitration*

Section 1. All grievances shall be first taken up between the Plant Management and the Shop Steward. If these parties shall be unable to settle the grievance, then the Business Agent of the Union shall be called in, in an attempt to arrive at a settlement of the grievance. If these parties are unable to settle the grievance, the dispute will be settled as called for in Sections 2 and 3 of this Article.

On May 16, 1973, the union advised the company, pursuant to § 8(d) of the National Labor Relations Act, that it wished to negotiate certain changes in the existing contract. There followed three months of fruitless negotiations which culminated in the union's giving the company the seven days written notice as required by Article XIX to terminate the contract on August 21, 1973. At a bargaining session held August 31, 1973, the union rejected the company's last offer and stated that it would strike unless the company agreed to its most recent offer. The company thereupon gave notice that it would permanently close its Norfolk bakery and subsequently paid wages and accrued benefits, including vacation pay for vacations earned and due employees, as of August 27, 1973, and additionally paid wages due for any work performed by its employees between August 27, 1973 and the permanent closing date.

Section 2. In the event that any grievance cannot be satisfactorily adjusted by the procedure outlined above, either of the parties hereto may demand arbitration and shall give written notice to the other party of its desire to arbitrate. No individual employee shall have the right to invoke arbitration without the written consent of the Union. The Arbitration Board shall consist of three (3) persons, one selected by the Company and one selected by the Union. The two persons selected shall agree upon a third person who shall act as Chairman of the Arbitration Board.

Section 3. The decision or award of the Arbitration Board, or a majority thereof, shall be final and binding on both parties. If the third party to arbitration is not selected in ten (10) days from receipt of notice, the Director of the U.S. Conciliation Service shall be requested to make the appointment. The expense of the neutral arbitrator shall be borne equally by the parties.

Section 4. Pending negotiations or during arbitration there shall be no strikes, lock-outs, boycotts, or any stoppages of work.

Subsequent to August 31, 1973, the union made a demand for severance pay, labeling such either "deferred wages" or a "vested right" established by the terminated contract, and further demanded that the company arbitrate the issue. The company refused to entertain the union's claim for severance pay or, in the alternative, to arbitrate the dispute, asserting that both severance pay and arbitration were rights created solely by the collective bargaining agreement. The company took the position that the union's voluntary termination of the contract on August 27, 1973, deprived its employees of any right to severance pay due under it as a result of the company's plant closure and any right to have the severance pay dispute submitted to arbitration.

The parties present to the Court for resolution two related issues: Whether employees who voluntarily through their union terminate a collective bargaining contract, containing severance pay and arbitration provisions, at the expiration of the contract period are entitled to (1) severance pay, and (2) the right to have the severance pay dispute submitted to arbitration when the employer subsequently closes the plant and terminates the employment of its employees. Because of the Court's disposition of the severance pay issue, it will be unnecessary to resolve the question whether arbitration rights survive the expiration of the collective bargaining agreement which created them.

A. JURISDICTION

The union asserts that the right of the company's employees to severance pay was created and vested in them by the collective bargaining contract. The claim of a contract between an employer and a labor organiza-

tion confers jurisdiction under § 301(a) of the Labor-Management Relations Act, although the plaintiff must prove the existence of the contract to obtain relief. *Genesco, Inc.* v. *Joint Council 13, United Shoe Workers of America*, 341 F.2d 482, 484 (2d Cir. 1965).[2]

B. CHOICE OF LAW

Federal law provides the beacon to guide the lower federal courts in fashioning the law of the collective bargaining agreement. *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 456 (1953). The Court undertakes its responsibility to fashion the common law of the collective bargaining agreement, however, with full awareness that *Lincoln Mills* does not "envision any free-wheeling inquiry into what the federal courts might find to be the most desirable rule, irrespective of congressional pronouncements." *Howard Johnson* v. *Detroit Local Joint Executive Board*, 42 U.S.L.W. 4834, 4836 (U.S., June 6, 1974).

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2. Since the Court holds herein that the union can show no arguable contractual entitlement to severance pay and that therefore there is no arbitrable severance pay dispute between the union and the company, it will be unnecessary to decide whether the union can obtain jurisdiction to compel arbitration under 9 U.S.C. § 4. The Court notes, however, that a written agreement to arbitrate is a prerequisite to the Court's taking jurisdiction under 9 U.S.C. § 4, and the Court has determined that there was no written contract in effect between the union and the company, when the company gave notice on August 31, 1973, of its intention to permanently close its Norfolk bakery. See *Proctor & Gamble Independant Union* v. *Proctor & Gamble*, 312 F.2d 181, 186 (2d Cir. 1962); *Local Union No. 998* v. *B. & T. Metals Co.*, 315 F.2d 432, 435-36 (6th Cir. 1963); *Ward Foods, Inc.* v. *Local No. 50, Bakery and Confectionery Workers Union*, 360 F. Supp. 1310, 1312 (S.D. N.Y. 1973).

C. ENTITLEMENT TO SEVERANCE PAY

"Severance Pay" as defined by Article IX, § 5 of the collective bargaining agreement is the right of full time employees who have been actively employed by the company for at least three years to obtain compensation from the company upon displacement from employment by the "introduction of labor saving equipment, the closing of a department, the closing of an entire plant, or by layoff." The plaintiff union proceeds from the premise that severance pay is an "earned" or "vested" right. As evidence in support of this contention, it points out that the severance pay clause appears in Article IX, entitled "Wages," of the collective bargaining agreement and urges that severance pay is earned by the employees of the company and accrue to them in the same manner that the hourly wage is earned and likewise accrues. See, *United Steelworkers of America* v. *H. K. Porter Co.*, 64 LRRM 2201 (W.D. Pa. 1966), where the court said that ". . . [t]he rights of the employees to such benefits as severance and vacation pay and pensions do not automatically terminate upon the expiration of the agreement establishing them. *John Wiley & Sons* v. *Livingston*, 376 U.S. 543 (1964). They are vested rights and their benefits may well come to fruition at a time beyond the term of the agreement establishing them." 64 LRRM at 2202-03.[3]

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3. The Court does not believe that *United Steelworkers of America* v. *H. K. Porter Co.*, 64 LRRM 2201 (W.D. Pa. 1966), governs the precise facts here at issue. There, the collective bargaining agreement terminated on its expiration date—not by the union's voluntary act of giving written notice, as in the instant case—during the course of contract negotiations, and the court apparently thought that the union's pension, vacation and severance pay rights were arguably vested by the collective bargaining agreement such that an arbitrable issue was preserved by the particular facts of that case. The *Steelworker's* court entered an arbitration order without expressing any opinion on the merits of the union's claim to severance pay, vacation pay, and pension rights.

The Court, however, must reject the union's major premise that the severance pay in issue constitutes an "earned" or "vested" right. The union's voluntary termination of its collective bargaining agreement with the company on August 27, 1973, in the Court's view, destroyed any right to severance pay created by the collective bargaining agreement for displaced employees.

The Court is not precluded by the fact that the severance pay clause is to be found in the article of the collective bargaining agreement entitled "Wages" from finding, as it does, that severance pay is not an earned or vested right. Mere labels are not always dispositive of legal relations between litigants, and courts often find it necessary to cut through the form in order to discover the substantive relations which lay beneath.

The Court rejects the contention that severance pay constitutes earned but deferred income. In the instant case, only certain employees were eligible for severance pay, they being those who had more than three years continuous employment with the bakery, and those eligible could obtain severance pay in only certain specified instances—when an employee is "permanently displaced from his employment with the company by reason of the introduction of labor saving equipment, the closing of an entire plant, or by layoff." Thus severance pay may be likened to an employee insurance policy to help ameliorate the disruptions caused by technological innovation or economic recession and smooth the displaced employees transition to new employment. The right to collect severance pay, like the right to collect on an insurance policy, is contingent upon the happening of the event in question—here a job layoff, a plant closure, or the

introduction of labor saving machinery—during the contract period. With severance pay, as with insurance, where the employee (or the insured) terminates the contract, the right to collect disappears.

Furthermore, severance pay is wholly a creation of the collective bargaining agreement and has no independent existence apart from that agreement. See *Milk Drivers* v. *Thompson's Dairy*, 80 LRRM 3403, 3404 (D. D.C. 1972), *aff'd. per curiam*, 489 F.2d 1272 (D.C. Cir. 1974); *cf. Patterson Parchment Paper Co.* v. *International Paperworkers*, 191 F.2d 252 (3d Cir. 1951). Severance pay provisions in a collective bargaining contract can be altered, modified, or terminated at the will of the parties. By terminating the contract in order to free itself of the no-strike clause as a prelude to calling a strike, as was its right so to do, the union gave up those benefits which were contingent upon the existence of a contract in the hope of securing more lucrative benefits by the application of economic pressure. The union cannot, however, jettison its contract when preparing to strike and then seek its protection once the company brings its own economic weapons into the fray. The union, to adopt a familiar phrase, cannot have its cake and eat it too under the umbrella protection of our national labor laws. Once having abandoned the protection of the contract to resort to legitimate economic struggle in order to improve the wages and working conditions of its membership, it will not be heard to complain when the company, finding itself unfettered by contract, retaliates with legitimate economic countermeasures. *Cf. Ameri-*

can Shipbuilding Co. v. *N.L.R.B.*, 380 U.S. 300, 310-12 (1965).[4]

The Court is satisfied that to hold severance pay a "vested" or "earned" right and breathe into it an existence apart from the collective bargaining contract would be to upset the congressionally created balance between union and employer. This it is loathe to do absent a more explicit directive from the national legislature.

Having concluded that the union voluntarily terminated the contract upon which their right to severance pay was founded, thus destroying any entitlement to severance pay upon the company's subsequent plant closure, the Court finds it unnecessary to decide the question whether the plaintiff's right to arbitrate the severance pay issue survived the expiration of the contract—there being no severance pay issue to arbitrate. The Court notes, however, that the same considerations which compelled its decision that the plaintiff had no right to severance pay would also compel a holding that the plaintiff has no right to submit the severance pay controversy to arbitration. The duty to arbitrate is created by contract and "[n]o obligation to arbitrate a labor dispute arises solely by operation of law." *Gateway Coal Co.* v. *U.M.W.*, 414 U.S. 368, 374 (1974). Since the severance pay issue in this case arose after the expiration of the contract upon which the right to arbitrate was founded, the company had no obligation to submit the dispute to arbitration.

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4. On the other hand, if the union is claiming that the company closed its Norfolk bakery in order to chill unionism in its other plants, rather than out of legitimate economic motives, the proper forum is the Labor Board, not this Court. See *Textile Workers Union* v. *Darlington Mfg. Co.*, 380 U.S. 263 (1965).

Accordingly, the company's motion for summary judgment will be granted, the union's cross motion for summary judgment will be denied, and the complaint will be dismissed for failure to state a claim upon which relief can be granted.

An appropriate order shall enter.

/s/ Robert R. Merhige, Jr.
United States District Judge

Date: 9-19-74

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 74-2285

Local Number 358, Bakery & Confectionary
Workers Union, AFL-CIO,
Appellant,
versus
Nolde Brothers, Incorporated,
Appellee.

Appeal From the United States District Court
For the Eastern District of Virginia,
At Richmond.

(Filed December 3, 1975)

Upon consideration of a motion of the appellant, for stay of mandate pending application to the United States Supreme Court for a writ of certiorai,

IT IS ORDERED that the motion is DENIED.

For the Court—by direction.

/s/ William K. Slate, II
Clerk

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

CIVIL ACTION NO. 73-0663-R

LOCAL NUMBER 358, BAKERY & CONFECTIONARY WORKERS UNION AFL-CIO,
Plaintiff,
v.
NOLDE BROTHERS, INCORPORATED,
Defendant.

ORDER

In accordance with the directions from the Fourth Circuit in *Local Number 358, Bakery & Confectionary Workers Union, AFL-CIO* v. *Nolde Brothers, Incorporated*, No. 74-2285 (October 23, 1975), and deeming it proper so to do, it is ORDERED and ADJUDGED that Nolde Brothers, Incorporated, submit to arbitration under Article XII of its collective bargaining agreement with the Confectionary Workers Union as requested by the Union on the issues of vacation and severance pay due the Union members at the company's Norfolk bakery, and proceed with said arbitration until a final award be made.

Let the Clerk send a copy of this Order to all counsel of record.

/s/ Robert R. Merhige, Jr.
United States District Judge

Dated: DEC 09 1975